

NO. 35350-4-11

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

SHAJUANDA SIMONE TATE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Waldo Stone, Judge Pro Tem

No. 06-1-02151-9

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Did the State prove beyond a reasonable doubt that defendant intended to kick Officer Syler when all of the evidence from trial characterizes defendant as intentionally kicking Officer Syler and when there is an absence of evidence suggesting that the defendant’s kick was accidental?..... 1

 2. Has defendant failed to demonstrate that the trial court abused its discretion when ordering defendant to sell her truck as a condition of a suspended sentence when her criminal history leads to a conclusion that such an order prevents future crimes? 1

B. STATEMENT OF THE CASE..... 1

 1. Procedure 1

 2. Facts 2

C. ARGUMENT..... 6

 1. THE STATE PRESENTED SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT INTENDED TO ASSAULT OFFICER SYLER..... 6

 2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN ORDERING THE SALE OF THE DEFENDANT’S TRUCK AS A CONDITION OF SUSPENDING HER SENTENCE..... 13

D. CONCLUSION..... 17

Table of Authorities

State Cases

<u>County of Spokane v. Farmer</u> , 5 Wn. App. 25, 29, 486 P.2d 296 (1971)	13
<u>Seattle v. Gellein</u> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989).....	6
<u>State ex rel. Schnock v. Barnett</u> , 42 Wn.2d 929, 259 P.2d 404 (1953)	16
<u>State v. Barrington</u> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), <u>review denied</u> , 111 Wn.2d 1033 (1988)	8
<u>State v. Camarillo</u> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	8
<u>State v. Cord</u> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985).....	8
<u>State v. Dainard</u> , 85 Wn.2d 624, 537 P.2d 760 (1975).....	13
<u>State v. Giraud</u> , 68 Wn.2d 176, 178, 412 P.2d 104 (1966)	16
<u>State v. Hays</u> , 55 Wn. App. 13, 16, 776 P.2d 718 (1989)	13
<u>State v. Holbrook</u> , 66 Wn.2d 278, 401 P.2d 971 (1965)	8
<u>State v. Joy</u> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993).....	8
<u>State v. Mabry</u> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988).....	6
<u>State v. McCullum</u> , 98 Wn.2d 484, 488, 646 P.2d 1064 (1983)	6
<u>State v. Riley</u> , 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993).....	13
<u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)	8
<u>State v. Summers</u> , 60 Wn.2d 702, 707, 375 P.2d 143 (1962)	13
<u>State v. Turner</u> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981).....	8
<u>State v. Williams</u> , 97 Wn. App. 257, 263, 983 P.2d 687 (1999).....	13

Statutes

RCW 10.105.010(1) 16

RCW 46.20.342(1)(a) 1

RCW 46.61.024(1) 1

RCW 9.92.060 13

RCW 9.92.060(1) 13

RCW 9A.08.010(1)(a) 7

RCW 9A.36.031(1)(g) 1, 7

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the State prove beyond a reasonable doubt that defendant intended to kick Officer Syler when all of the evidence from trial characterizes defendant as intentionally kicking Officer Syler and when there is an absence of evidence suggesting that the defendant's kick was accidental?
2. Has defendant failed to demonstrate that the trial court abused its discretion when ordering defendant to sell her truck as a condition of a suspended sentence when her criminal history leads to a conclusion that such an order prevents future crimes?

B. STATEMENT OF THE CASE.

1. Procedure

Shajuanda Simone Tate (“defendant”) was charged by Information with third degree assault under RCW 9A.36.031(1)(g), attempting to elude a pursuing police vehicle under RCW 46.61.024(1), and driving with a suspended or revoked license in the first degree under RCW 46.20.342(1)(a). CP 1-2.

A jury trial on the charges began on August 28, 2006. 08/28/06 RP 2.¹ On August 30, 2006 the jury found the defendant guilty on all three counts as charged. CP 5-7; 08/30/06 RP 2.

The court sentenced defendant to 22 months for the assault charge, 12 months for the attempt to elude a police vehicle charge to be served concurrently, and 12 months, with 6 months suspended on certain conditions, on the misdemeanor driving with a suspended license charge to be served consecutively. CP 40-44; 09/08/06 RP 20. The conditions of the partial suspension of the misdemeanor sentence were that the defendant: pay legal financial obligations as set forth; not drive without license and insurance; and maintain law abiding behavior. CP 40-44; 9/08/06 RP 21. The court further ordered that the defendant's truck be commercially sold for fair value. *Id.*

The defendant filed her notice of appeal on September 14, 2006. CP 45-58.

2. Facts

On May 10, 2006, Lakewood Police Officer James D. Syler was patrolling the South Tacoma Way corridor, in Pierce County, Washington, with his canine partner Titan. 08/29/06 RP 3, 7, 10, 11. At approximately

¹ Due to repeating page numbers in the four separate reports of proceedings, the specific volume will be referenced by the date of the proceeding contained in each volume. Defense's brief employs an identical method of cite.

0400 hours, Officer Syler noticed a vehicle that appeared to be speeding. 08/29/06 RP 28. Officer Syler proceeded to pull behind the vehicle and run a check of the vehicle's license. Id. Through the check Officer Syler discovered that the owner of the vehicle was Shajuanda Tate, defendant, and that she had a suspended license in the first degree. 08/29/06 RP 11, 12, 25.

Officer Syler stopped the vehicle around the 8200 block of South Tacoma Way. 08/29/06 RP 11-12. A backup unit pulled in behind Officer Syler to assist in the stop. 08/29/06 RP 46. Approaching the vehicle, Officer Syler noticed two females in the front seats of the vehicle. 08/29/06 RP 12. The driver of the vehicle identified herself as Shajuanda Tate, and confirmed that the vehicle belonged to her. 08/29/06 RP 12-13.

Upon this admission, Officer Syler advised defendant that she was under arrest for driving with a suspended license. 08/29/06 RP 14. Officer Syler asked defendant to turn off the engine and step out of the vehicle. Id. In response, defendant put her car into drive and rapidly accelerated, speeding away from the officer. Id.

Officer Syler and the assisting officer immediately ran back to their vehicles to pursue defendant. 08/29/06 RP 15, 50. Officer Syler was able to catch up to defendant's vehicle after several blocks of chase. Id. Defendant admitted seeing Officer Syler directly behind her vehicle, but refused to stop, reaching speeds in excess of 80 miles-per-hour. 08/29/06

RP 15, 70. The chase continued for approximately 14 blocks. 08/29/06
RP 16.

Finally, defendant made a right turn onto 58th Avenue after which her vehicle came to a sudden stop. 08/29/06 RP 16. By the defendant's own admission, she only stopped because her car stalled and began slowing down by itself. 08/29/06 RP 70. Defendant climbed through the driver's side window and ran away on foot. 08/29/06 RP 16.

Officer Syler watched defendant and her passenger climb out of the driver's window as her vehicle continued to roll forward into a parked car. 08/29/06 RP 17. Defendant and her passenger ran northbound to an adjacent residential street. 08/29/06 RP 18. Officer Syler chased defendant in his vehicle until defendant ran across the road directly in front of his car. Id. At this point Officer Syler stopped, got out of his vehicle, and continued to pursue the defendant on foot. Id. Officer Syler pursued defendant, while the assisting officer detained the passenger. 08/29/06 RP 18, 63.

Officer Syler momentarily lost sight of the defendant when she ran into the back yard of a residence. 08/29/06 RP 19. At this point Officer Syler gave defendant a verbal warning stating, "[p]lease stop or I will send my dog." 08/29/06 RP 18. Once again, defendant refused to stop. Id. Unsure if defendant was armed, Officer Syler released Titan from the backseat of his car using a remote control. 08/29/06 RP 18-19.

Titan gave chase and contacted the defendant as she was attempting to climb over a fence in the backyard. 08/29/06 RP 20. Titan grabbed the defendant by the back of her right leg and pulled her off of the fence to the ground. Id. Officer Syler ran in behind Titan, ordering the defendant to show her hands. Id. Again, the defendant refused to comply with Officer Syler's command, instead trying to remove Titan's mouth from her leg. Id.

Eventually, Officer Syler ordered Titan to release the defendant. 08/29/06 RP 20-21. Officer Syler took a hold of Titan's collar, while continuing to order the defendant to stop struggling. Id. After Officer Syler got a hold of Titan, the defendant rolled over onto her back and began fighting and kicking at Officer Syler. 08/29/06 RP 21. Next, the defendant kicked Officer Syler on the right side of his face, in his right temple area. Id. A sharp pain shot down Officer Syler's jaw. Id.

In response, Officer Syler struck the defendant. 08/29/06 RP 22. He also released Titan who grabbed defendant by her arm. Id. Officer Syler once again ordered defendant to stop fighting and show her hands. Id. Finally, defendant complied; Officer Syler recalled Titan. Id. By this time, additional officers arrived on the scene and assisted in taking the defendant into custody. 08/29/06 RP 22-23.

At trial, defendant admitted to fleeing from Officer Syler after he signaled her to stop and did not dispute driving with a suspended license. 08/29/06 RP 69, 112. However, as to the assault charge the defendant

denied ever kicking Officer Syler. 08/29/06 RP 77. Defendant stressed that she never swung her foot out at any time. Id.

Defendant suggested that Officer Syler became “aggravated” over the pursuit, and twice punched her without any warning as she complied with his commands. 08/29/06 RP 76, 122. Defendant averred that officer Syler made up the story that she kicked the officer in the head so that he would not be charged with assault. 08/29/06 RP 122.

The jury found the defendant guilty on all three charges. 8/30/06 RP 2.

C. ARGUMENT.

1. THE STATE PRESENTED SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT INTENDED TO ASSAULT OFFICER SYLER.

A review of the evidence presented at trial supports a conclusion that defendant intended to assault Officer Syler.

To begin, due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 646 P.2d 1064 (1983); see also Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). Here, defendant was

charged with a crime defined under RCW 9A.36.031(1)(g) which states that:

A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree...[a]ssaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault[.]

The crime of assault is further defined in an instruction that was provided to the jury which states:

An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person...

An assault is also an act done with intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented...

(CP 8-26). Intent is defined in RCW 9A.08.010(1)(a), as when a person “acts with the objective or purpose to accomplish a result which constitutes a crime.” Defendant alleges that the State failed to prove the “intent” element of the statute beyond a reasonable doubt.

In assessing whether the State adequately proved the intent element of the statute beyond a reasonable doubt, the applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy,

121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Courts of appeal must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

- a. The evidence and all reasonable inferences drawn from the evidence support a conclusion that defendant intended to kick Officer Syler.

The evidence viewed in the light most favorable to the prosecution, as well as all of the reasonable inferences from the evidence, prove beyond a reasonable doubt that defendant intended to assault Officer Syler.

To begin, Officer Syler specifically testified that defendant's actions looked intentional. 08/29/06 RP 35. During cross examination, Officer Syler was specifically asked whether he knew if defendant was intending to kick at him, or whether she was kicking at the dog. Id. Officer Syler responded that he did not think defendant was striking out at the dog, since he was struck directly in the head. Id. The reasonable inference in favor of the state from such a statement is that the defendant could only have landed a kick to Officer Syler's head if she were intending to accomplish this result.

Officer Syler was further questioned as to whether the defendant was facing away from the Officer at the time of the kick, to which Officer Syler responded, "[n]o. She rolled over on her back and then kicked me in the head." Id. at 35. A reasonable inference from this statement is that Officer Syler saw the defendant roll over on her back and look at him before she kicked him. Again, such a statement and inference in favor of the state suggests that the defendant acted with purpose when kicking him.

Furthermore, the defendant failed to present any evidence that would support a conclusion that the kick was accidental. 08/29/06 RP 77. The defendant adamantly stressed on two separate occasions that she never even swung her foot out at any time. 08/29/06 RP 77, 80. The jury clearly disregarded this testimony.

Officer Syler's testimony describing defendant's intentional acts, in combination with the jury's rejection of defendant's testimony support a conclusion that the State proved beyond a reasonable doubt that the defendant intended to kick Officer Syler.

- b. Defendant's new theories of defense fail to prove an absence of intent and are directly contradicted by her own testimony from trial.

At trial, the defendant asserted that Officer Syler fabricated the story of defendant's kick to his head to protect himself from assault charges from punching defendant. 08/29/06 RP 122. Amazingly, the defendant now suggests that "in her efforts to get free from the dog, Tate's foot accidentally contacted the officer's head," thus undermining any intent. Brief of Appellant at 7. However, this new defense is not supported by the record, and is in fact directly negated by the testimony of defendant herself.

While defendant did testify that she tried to free herself from Titan, the defendant specifically testified that she never tried to kick Titan off of her. 08/29/06 RP 77, 81. When asked, "[d]id you swing out your foot at him [Officer Syler] at any time," the defendant responded, "[n]o." 08/29/06 RP 77. When further asked, "[d]id you kick at the dog to get the dog off," the defendant responded, "[n]o. I opened -tried to open his mouth is all I did." Id. The defendant went on to repeat five separate

times that she was merely trying to open the dog's mouth, and stated two times that she did not ever strike out at Titan. 08/29/06 RP 74, 75, 76, 77, 81. In light of such adamant testimony from defendant, this new assertion clearly has no support from the trial court record.

Defendant further asserts that "testimony does not establish beyond a reasonable doubt that in the split-second after she rolled over after the dog released her leg, she formed the intent to kick Officer Syler." Brief of Appellant at 7. Defendant goes on to claim that the defendant "likely could not even see where Officer Syler was standing." *Id.* Again, neither of these assertions are supported by testimony from the trial court and are directly negated.

To begin, nowhere in the testimony is the time period between when the defendant rolled over and when she kicked Officer Syler in the head described as a "split-second," as defendant now characterizes the time period. Brief of Appellant at 7. Officer Syler consistently testified that he pulled Titan off of defendant, she rolled over and began fighting with him, and she kicked him in the side of his face. 8/29/06 RP 21, 35. This testimony suggests that the defendant had sufficient time to form intent. Absent is any language suggesting that the time period was so short that the defendant did not have time to form intent. Nor does

defendant cite any law supporting a claim that the formation of intent is a lengthy process.

Furthermore, defendant's new assertion that she "likely could not even see where Officer Syler was standing," when the kick occurred is again contradicted by evidence from trial. During trial, the Defense specifically questioned Officer Syler as to whether the defendant was facing away from the officer at the time of the kick. 8/29/06 RP 35. Officer Syler responded, "[n]o. She rolled over on her back and then kicked me in the head." Id. The reasonable inference from this testimony being that the defendant rolled over, saw Officer Syler, then kicked out.

Moreover, the defendant was specifically asked, "[d]id you see – was the officer present at that point?" referring to the point immediately prior to the defendant's kick to Officer Syler's head. 8/29/06 RP 75. Defendant replied, "he walked up when I was trying to get the dog off of my leg." Id. By her own testimony, defendant was aware of Officer Syler's presence.

Essentially, defendant asks this court to reweigh the evidence presented below. That is not the function of an appellate court when faced with a challenge to the sufficiency of the evidence. Accordingly, the assault conviction should be upheld.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN ORDERING THE SALE OF THE DEFENDANT'S TRUCK AS A CONDITION OF SUSPENDING HER SENTENCE.

The nature of defendant's crimes as well as defendant's previous criminal history all support a conclusion that the trial court did not abuse its discretion when ordering the sale of defendant's truck as a condition of suspending her sentence.

Crime-related sentencing conditions and prohibitions are reviewed for abuse of discretion. State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993). Abuse of discretion occurs when the trial court's decision is manifestly unreasonable or exercised on untenable grounds for untenable reasons. State v. Hays, 55 Wn. App. 13, 16, 776 P.2d 718 (1989).

RCW 9.92.060 has been held to provide authority for the court to suspend a sentence with such conditions as bear a reasonable relation to the defendant's duty to make reparation, or as tend to prevent the future commission of crimes. RCW 9.92.060(1); State v. Williams, 97 Wn. App. 257, 263, 983 P.2d 687 (1999); County of Spokane v. Farmer, 5 Wn. App. 25, 29, 486 P.2d 296 (1971); State v. Summers, 60 Wn.2d 702, 707, 375 P.2d 143 (1962). In exercising its discretion to either suspend or not suspend a sentence, the trial court may consider other offenses committed by the defendant. State v. Dainard, 85 Wn.2d 624, 537 P.2d 760 (1975).

In this case, defendant was found guilty of attempting to elude a pursuing police vehicle, and driving with a suspended or revoked license in the first degree. 08/30/06 RP 2. Both of these crimes occurred while defendant was driving her truck. Additionally, during sentencing the court heard of the defendant's prior adult misdemeanor convictions which include three additional convictions for driving with a suspended license. 09/08/06 RP 6.

Consequently, the trial court ordered that "as a condition of the six months suspended that that truck be commercially sold," for a "fair value." CP 40-44; 09/08/06 RP 21. Justifying this condition for suspension, the court stated that it wanted defendant to "learn to ride the bus or walk or ride a bicycle wherever [she was] going," since it was "going to be a long time before [she had] a driver's license." 09/08/06 RP 21.

Viewing defendant's criminal history, it is clear that the trial court reasonably intended to "prevent the future commission of crimes," by taking away from defendant the instrument that had been used in all of these crimes: her truck. The defendant had just been convicted of two crimes where she had used her truck as an instrument of the crime. Also, the defendant had previously been convicted of three misdemeanors where her vehicle was also used as an instrument of the crime. In response, the

trial court reasonably conditioned a suspended sentence on the defendant selling her vehicle, the aim being to prevent future crimes by the defendant using her vehicle. Thus, the court did not abuse its discretion in issuing the condition.

The defendant attempts to characterize the condition of the suspended sentence as only a “moral” lesson that will not prevent future crimes. Brief of Appellant at 10. Defendant cites Arizona law holding that conditions based on moral obligations are an abuse of discretion. Id.

However, a fair reading of the transcript makes clear that the court’s primary reason for the condition was to prevent future crime, with the symbolic justification being an afterthought. 09/08/06 RP 21, 24. To begin, the “symbolic” comment was made several moments after the court’s central explanation that it wanted to prevent defendant from committing future crimes through driving. 09/08/06 RP 21, 24. Chronologically, when the court issued the condition for the suspension, the court first justified the condition with the language about preventing future crime by defendant. 09/08/06 RP 21. Only when the court was later pressed about the condition did the court add the comment about the condition being something symbolic. 09/08/06 RP 24.

Additionally, when the court made the symbolic comment, the court stated, “[i]t’s *also* symbolic that we mean business.” 09/08/06 RP

24 (emphasis added). The use of the word “also” indicates that the court intended that the symbolic purpose of the condition to be in addition to a purpose already stated, which was to prevent future crime.

Finally, it should be noted that a defendant whose guilt has been established has no right to a suspension of the execution of his sentence and to probation; these come to him as an act of grace or a kind of leniency granted by the court in the exercise of its discretion. State v. Giraud, 68 Wn.2d 176, 178, 412 P.2d 104 (1966); State ex rel. Schnock v. Barnett, 42 Wn.2d 929, 259 P.2d 404 (1953). Even more, in this case, because defendant’s vehicle was used as an instrumentality in the commission of a felony, the vehicle was subject to seizure and forfeiture under RCW 10.105.010(1) which was not done. Instead, through an act of leniency, the court gave defendant an opportunity to suspend part of her sentence by receiving fair monetary compensation for her vehicle. This condition reasonably relates to the prevention of future crimes by the defendant because of the nature of her convictions as well as her criminal history.

D. CONCLUSION.

For the reasons set forth above, the State respectfully request that this court affirm defendant's conviction for third degree assault, and that this court affirm defendant's sentence.

DATED: APRIL 9, 2007

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4/9/07 [Signature]
Date Signature

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